

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1326

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against

KEVIN MANGAN,

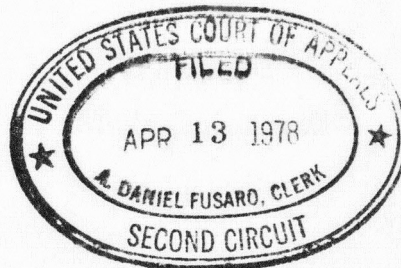
Defendant-Appellant.

77-1326

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p/s

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PETITION FOR REHEARING
WITH SUGGESTION FOR
REHEARING EN BANC



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POINT I

PURSUANT TO F. R. APP. P. 28(i) AND FOR THE REASONS STATED IN APPELLANT'S MAIN BRIEF (POINT V), APPELLANT ADOPTS BY REFERENCE THE POINTS RAISED BY CO-APPELLANT IN HIS PETITION FOR REHEARING

POINT II

THE COURT'S HOLDING THAT AN INDIGENT DEFENDANT'S RIGHT TO CROSS-EXAMINATION CAN BE SEVERELY LIMITED IF HE DOES NOT CALL AN ASSIGNED EXPERT ON HIS OWN BEHALF APPEARS TO ANNOUNCE A NEW AND UNCONSTITUTIONAL STANDARD THAT PERMITS THE GOVERNMENT WITNESS TO REFUSE TO RESPOND TO DEFENSE QUESTIONING AND THAT PERMITS THE GOVERNMENT TO PRESENT EVIDENCE UNAVAILABLE FOR JURIDICAL SCRUTINY

Appellant respectfully submits that this Court's ruling that, "the defense's failure to call its expert is critical" in determining whether cross-examination of the government expert was unduly obstructed (page 24 of typed opinion), places an unconstitutional burden on the defense and conflicts with this Court's contrary holding in United States v. Durant, 545 F.2d 823 (2d Cir., 1976). Indeed, the right and ability to cross-examine should be more carefully guarded when the defense does not produce its own expert, because the Constitution permits the defense to rely

on cross-examination of the government's accusation, not necessarily to "demolish" it. (Id. at 23), but, to establish a reasonable doubt and, thereby to establish the legal equivalent of innocence. The Court appears to hold here that in the case of an indigent defendant, unlike a defendant who retains privately the employment of experts whose existence need not be disclosed, the required public employment and disclosure of an expert cross-examination aide, whose association becomes known to the government, can be used against the indigent defendant to measure with a different standard the extent of his right to confrontation of the government's witnesses. This results, we submit, in an unequal application of the Sixth Amendment.

Either the defendant in a criminal case has the burden to prove something or he does not. So far, he has not had such a burden and courts and juries are not supposed to draw negative inferences. There seems to be no precedent for this Court's imposing the burden in this case as a price for the full exercise of the right to confrontation, and, as tempting as it is to draw the negative inference, it is unfounded in law, and in fact, when, especially in the case of indigents, the defense is severely limited by the Criminal

Justice Act in the search for, and employment of, experts in its behalf.

Had there been the cross-examination of the expert in this case which counsel attempted with his specifically directed questions, his production of the magnifying glass, his request that blow-ups be made, the Court and the jury would have learned that dissimilarities in identified prints do appear, and that the expert, when confronted with one that could destroy his identification, will have to prove to a jury's satisfaction why the dissimilarity is insignificant. This is no easy task, and the very one that Officer Levin and the government avoided in this case. It is a judgmental operation that should have been open to juridical scrutiny.

This Court errs further, we submit, in assuming the validity of the government expert's unexamined conclusion and in deciding, in place of a jury that rendered a guilty verdict, that counsel's having elicited from the expert a refusal to be examined was effective cross-examination. It should be remembered that the trial court said below, "We don't know whether he's made an error or not because we have never seen the basis for his conclusion." (T 1370). A jury that is told it may accept the opinion of this expert, despite his refusal to be scrutinized, could

not be "effected" by the cross-examination permitted in this case. All government evidence should be subject to scrutiny when presented in court, notwithstanding any assumptions by the Court based on the lack of defense evidence. This is, after all, the purpose of the Confrontation clause. Even assuming arguendo a defense expert opinion, two experts can be as wrong as one, and the jury is the body that makes the determination after full cross examination of those who take the stand.

Another anomaly in the Court's opinion is its recognition, on the one hand, that the government expert could easily have prepared himself to answer questions concerning his analysis and its holding, on the other hand, that he need not be required to do so. (Id. at 23-24). This holding, against the rules and the precedent cited in appellant's main brief, permits the government to put expert witnesses on the stand deliberately unprepared, lacking whatever tools would enable them to (1) respond to cross examination, and (2) make their testimony intelligible and available for jury analysis, and then to require the defense to provide those tools. This Court rejected the government's contention that the prints themselves were not the evidence (Id. at vii n. 17), and yet the government was permitted to

present testimony about the prints with no way for jury comparison of the inked and latent impressions. This form of deprivation of the right to trial by jury was not discussed by the court. Surely, it is the government, or any party, who offers the evidence, who has the obligation to present it in a manner that will permit jury analysis. Here the expert was supposed to aid the jury in its analysis of the evidence, the prints, not replace that analysis with an unchallengeable conclusion of fact.

For cross-examination purposes, counsel could not have known, until the witness said so from the stand, that the witness would not even respond to questions about his points of comparison.

Counsel's motion to strike was denied by the Court who stated it believed that cross-examination was not being hampered by the witness' refusal to answer in the absence of blow-ups. This ended the matter as far as counsel was concerned, because the Court had already stated that no continuance would be granted unless it found that cross-examination was obstructed by the absence of blow-ups. Thus, counsel was never given any real opportunity to have blow-ups prepared, and this Court, with all due deference, misreads the record when it places the onus on counsel. It is also

unrealistic to ask opposing counsel in such a situation to prepare blow-ups to illustrate points of comparison that a witness against him has so far not revealed. Just as Officer Levin refused to use the magnifying glass, all sorts of problems of laying the foundation for the blow-ups and the witness' dissatisfaction with blow-ups for his use prepared by his opposition make this alternative cumbersome and a waste of resources. As this Court recognized in oral argument, and as the government illustrated with other prints in the case, customary practice is for blow-ups to be prepared by the witness or the offering party, and, as appellant has argued, the Constitution, and good sense, should require it.

CONCLUSION

FOR THE ABOVE STATED REASONS AND FOR THE REASONS STATED IN APPELLANT'S BRIEF, PETITION FOR REHEARING SHOULD BE GRANTED AND THE JUDGMENT OF CONVICTION REVERSED.

Respectfully submitted,

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FEB 13 1978